

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

THE STATE OF NEW MEXICO  
on behalf of the NEW MEXICO  
ENVIRONMENT DEPARTMENT,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY;  
GINA MCCARTHY, in her official capacity as  
Administrator, United States Environmental  
Protection Agency;  
ENVIRONMENTAL RESTORATION LLC;  
KINROSS GOLD CORPORATION;  
KINROSS GOLD U.S.A., INC.; and  
SUNNYSIDE GOLD CORPORATION,

Defendants.

CASE NO.: 16-cv-00465-MCA-LF

Hon. M. Christina Armijo, U.S.D.J.

**DEFENDANT ENVIRONMENTAL  
RESTORATION, LLC'S  
DESIGNATION OF NON-PARTIES AT  
FAULT UNDER COLO. REV. STAT.  
§ 13-21-111.5(3)(b)**

**COMES NOW** Defendant Environmental Restoration, LLC (“ER”), pursuant to Colorado Revised Statute § 13-21-111.5(3)(b), by and through its counsel, Glaser Weil Fink Howard Avchen & Shapiro LLP and Moses, Dunn, Farmer & Tuthill, P.C., and hereby designates non-parties Weston Solutions, Inc., State of Colorado, K&P Property Designs, Gold King Mines Corporation, and San Juan Corporation (the “Non-Parties”), which may be wholly or partially at fault in this action notwithstanding that (i) the Court has not yet decided that Colorado substantive law applies (as it may when it hears ER’s pending Motion to Strike brought under Rule 12(f)); (ii) some or all Defendants may be seeking relief (as the statute allows) from the deadline for filing such notice of non-party designation (ninety (90) days after commencement of the action against such responding party, *i.e.*, from service of the Summons and Complaint); and (iii) the Navajo Nation as plaintiff just filed its lawsuit in this same Court, creating a new 90-day deadline (commencing upon service to each defendant named therein),

wherein other parties are joined as defendants which were not joined in the present action and, thus, whether to refer to a party as a “Non-Party” under the relevant statute should await the filing of all complaints arising from the same operative allegations. In light of the foregoing, in an abundance of caution given that discovery has not commenced and no trial date has yet been set, in support of this Designation, ER states as follows:

1. Although the involvement of the Non-Parties is still being investigated and no discovery has yet taken place, ER designates the Non-Parties, which may be wholly or at least partially at fault in this action assuming, for purposes of this Designation only, some or all of the allegations of Plaintiff State of New Mexico (“Plaintiff”). By filing this Designation, ER does not admit that it was in any way responsible for the conduct alleged in Plaintiff’s Complaint or that the claimed damages were caused by ER.

2. Discovery may reveal additional non-parties who or which may be partially or wholly at fault in this action. ER reserves the right to amend this Designation if any additional non-parties are discovered. ER also reserves the right to join all or part of any similar designation filed by any other party in this action.

**Weston Solutions, Inc.**

3. ER designates Weston Solutions, Inc. (“Weston”) and all employees, agents and representatives under its employ, direction and supervision involved in the Gold King Mine site, including but not limited to Elliot Petri, Jan Christner, Jen Patureau, Jeff Bryniarski and Eric Sandusky, as a Non-Party which may be wholly or partially at fault in this action.

4. Weston’s last known address is 1400 Weston Way, P.O. Box 2653, West Chester, PA 19380.

5. At all relevant times, Weston was the Superfund Technical Assessment and Response Team (“START”) contractor for Defendant United States Environmental Protection Agency (“EPA”) at the Gold King and Red & Bonita Mines in Silverton, Colorado.

6. As such, in 2014 and 2015, Weston, as EPA’s START contractor, was under contract to monitor and evaluate water that was discharging from the Gold King Mine and consult with EPA about the conditions inside the Gold King Mine. A Weston employee was frequently on-site during the work that EPA was directing ER to perform at Gold King in the summer of 2015, including on the day of the release at issue in the Complaint.

7. Based on information and belief, Weston was involved in determinations about the conditions inside the Gold King Mine, upon which others relied.

8. EPA also tasked Weston with formulating an “Emergency Action Plan” for Gold King, which Weston prepared in July 2015. Weston’s Emergency Action Plan included strategies for an “In-Mine Emergency,” such as a “cave in or other observable incident in mine.” The release at issue in the Complaint occurred on August 5, 2015.

**State of Colorado**

9. ER designates State of Colorado, by and through its Department of Natural Resources, Division of Reclamation and Mining Safety (“DRMS”) and its Department of Public Health and Environment, Water Quality Control Division (“WQCD”), as Non-Parties which may be wholly or partially at fault in this action.

10. The last known address of DRMS is 1313 Sherman Street, Room 215, Denver, Colorado 80203.

11. The last known address of WQCD is 4300 Cherry Creek Drive South, WQCD-

B2, Denver, Colorado 80246.

12. As alleged in Plaintiff's Complaint (both in this action and in the action before the U.S. Supreme Court, original action no. 147) WQCD and Defendant Sunnyside Gold Corporation ("Sunnyside") entered into a Consent Decree and Order, filed May 8, 1996, in State of Colorado District Court, City and County of Denver (the "Consent Decree"). Pursuant to the Consent Decree, WQCD allowed Sunnyside to install two bulkheads in the American Tunnel. As a direct and proximate result of Sunnyside installing the WQCD-approved bulkheads in the American Tunnel, water that otherwise would have drained out of the American Tunnel portal flowed through underground fractures and fault systems to the Gold King Mine adit, where the water was impounded. Prior to the installation of the bulkheads in the American Tunnel, Gold King Mine was a dry mine. After the installation of the bulkheads in the American Tunnel, there was an increase in discharge from the Gold King Mine portal.

13. As also alleged in Plaintiff's complaints, DRMS undertook a reclamation project at the Gold King Mine in 2008 and 2009, the goal of which was to properly seal the Gold King Mine portal such that acid mine drainage could drain from the adit in a controlled and environmentally safe manner. DRMS failed to properly seal the Gold King Mine portal during this period.

14. As also alleged in Plaintiff's complaints, DRMS consulted with and advised EPA in connection with the reclamation project that EPA directed at the Gold King Mine in 2014 and 2015, including the "approach" for opening the blocked Gold King Mine portal. DRMS employees were frequently on-site at Gold King in the summer of 2014 and 2015, including on the day of the release at issue in the Complaint. DRMS employees observed and monitored the

ongoing work at Gold King and the site conditions, and provided advice to EPA on whether and how to proceed with EPA's reclamation project. EPA relied on the advice provided by DRMS in directing work at Gold King.

15. Based on information and belief, DRMS failed to provide all information it had at its disposal about the conditions inside the Gold King Mine to EPA and ER, and also omitted to provide complete advice to EPA on how best to proceed.

16. Following the release from the Gold King Mine on August 5, 2015, as alleged in Plaintiff's complaints, the State of Colorado failed to take proper action to mitigate the effects of the release and the extent of downstream contamination.

**K&P Property Designs**

17. ER designates K&P Property Designs ("K&P") as a Non-Party which may be wholly or partially at fault in this action.

18. The last known address of K&P is 236 South 3rd Street, #219, Montrose, Colorado 81401.

19. DRMS hired K&P as its contractor to perform reclamation work at the Gold King Mine in the summer of 2009. While undertaking such work, a collapse occurred inside the Gold King Mine. According to DRMS records, the collapse created "an emergency situation where blow-out of mine drainage might occur." Following the collapse, K&P failed to properly install a drainage pipe through the Gold King Mine portal. As a result of this failure, water and acid mine drainage could not properly drain from the Gold King Mine, which contributed to the conditions that ultimately resulted in the release at issue in the Complaint.

**Gold King Mines Corporation**

20. ER designates Gold King Mines Corporation ("GKM") and its owner(s), director(s), manager(s) and all employees, agents and representatives under its employ, direction and supervision, including but not limited to Stephen Fearn, as a Non-Party which may be wholly or partially at fault in this action.

21. The last known address of GKM is 729 Reese Street, Silverton, Colorado 81433.

22. GKM is the former owner of the Gold King Mine.

23. During its ownership of the Gold King Mine, GKM knew or should have known that the amount of water and acid mine drainage flowing into the Gold King Mine was increasing. Despite such knowledge, GKM failed to timely address the problem of impounded water and acid mine drainage inside the Gold King Mine, which exacerbated and contributed to the conditions inside the Gold King Mine that ultimately resulted in the release at issue in the Complaint.

24. GKM failed to control the discharge of acid mine drainage from the Gold King Mine and to prevent such drainage from reaching and impacting Cement Creek and the Animas and San Juan Rivers.

**San Juan Corporation**

25. ER designates San Juan Corporation ("San Juan") and its owner(s), director(s), manager(s) and all employees, agents and representatives under its employ, direction and supervision, including but not limited to Todd Hennis, as a Non-Party which may be wholly or partially at fault in this action.

26. The last known address of San Juan is 15100 Foothill Rd., Golden, Colorado

80401.

27. San Juan is the current owner of the Gold King Mine and the nearby Mogul Mine.

28. During its ownership of the Gold King Mine, San Juan knew or should have known that the amount of water and acid mine drainage flowing into the Gold King Mine was increasing. Despite such knowledge, San Juan failed to timely address the problem of impounded water and acid mine drainage inside the Gold King Mine, which exacerbated and contributed to the conditions inside the Gold King Mine that ultimately resulted in the release at issue in the Complaint.

29. In the summer of 2007, mine drainage from the Gold King Mine portal breached an existing ditch. According to DRMS records, San Juan failed to “completely address the breached ditch.” Based on information and belief, San Juan’s failure to do so contributed to the alleged contamination of Cement Creek and the Animas and San Juan Rivers.

30. San Juan failed to control the discharge of acid mine drainage from the Gold King Mine and to prevent such drainage from reaching and impacting Cement Creek and the Animas and San Juan Rivers.

WHEREFORE, ER designates Weston Solutions, Inc., State of Colorado, K&P Property Designs, Gold King Mines Corporation, San Juan Corporation, and their representatives, as potential non-parties at fault within this action and respectfully requests that the Court make such special findings determining the percentage of negligence or fault attributable to the above described Non-Parties designated pursuant to Colo. Rev. Stat. § 13-21-111.5.

DATED: August 25, 2016

GLASER WEIL FINK HOWARD  
AVCHEN & SHAPIRO LLP

By: /s/ Terry D. Avchen

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 25, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Andriy R. Pazuniak  
Andriy R. Pazuniak